

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4 CHADD M. HILLEN,

5 Plaintiff,

6 vs.

7 NANCY A. BERRYHILL, Acting Commissioner
8 of Social Security,

9 Defendant.

2:16-cv-00913-JCM-VCF

REPORT & RECOMMENDATION

10 This matter involves Plaintiff Chadd Hillen's appeal from the Commissioner's final decision
11 denying Hillen's social security benefits. Before the Court are Hillen's Motion for Reversal and/or
12 Remand (ECF No. 25) and the Commissioner's Cross-Motion to Affirm (ECF No. 27). For the reasons
13 stated below, the Court recommends denying Hillen's Motion and granting the Commissioner's Motion.
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15 **STANDARD OF REVIEW**

16 The Fifth Amendment prohibits the government from depriving persons of property without due
17 process of law. U.S. CONST. amend. V. Social security claimants have a constitutionally protected property
18 interest in social security benefits. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Gonzalez*
19 *v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990). Where, as here, the Commissioner of Social Security
20 renders a final decision denying a claimant's benefits, the Social Security Act authorizes the District Court
21 to review the Commissioner's decision. *See* 42 U.S.C. § 405(g); *see also* 28 U.S.C.
22 § 636(b) (permitting the District Court to refer matters to a U.S. Magistrate Judge).

23 The District Court's review is limited. *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015)
24 ("[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for
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1 that of the agency.” (quoting *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir.
2 2014))). The Court examines the Commissioner’s decision to determine whether (1) the Commissioner
3 applied the correct legal standards and (2) the decision is supported by “substantial evidence.” *Batson v.*
4 *Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). Substantial evidence is defined as
5 “more than a mere scintilla” of evidence. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Andrews v.*
6 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). This means such relevant “evidence as a reasonable mind
7 might accept as adequate to support a conclusion.” *Consolidated Edison Co. v. NLRB*, 305 U.S. 197
8 (1938); *Gutierrez v. Comm’r of Soc. Sec.*, 740 F.3d 519, 523 (9th Cir. 2014).

9 If the evidence supports more than one interpretation, the Court must uphold the Commissioner’s
10 interpretation. (See *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). This means that the
11 Commissioner’s decision will be upheld if it has any support in the record. See, e.g., *Bowling v. Shalala*,
12 36 F.3d 431, 434 (5th Cir. 1988) (stating that the court may not reweigh evidence, try the case *de novo*, or
13 overturn the Commissioner’s decision if the evidence preponderates against it).

14 **DISCUSSION**

15 In this case, the Administrative Law Judge (“ALJ”) followed the five-step sequential evaluation
16 process in 20 C.F.R. § 404.1520. The ALJ concluded Hillen did not engage in substantial gainful activity
17 during the relevant timeframe. (ECF No. 16 at 21). The ALJ found Hillen suffered from medically
18 determinable severe impairments consisting of degenerative joint disease of the lumbar spine,
19 hypertension, diabetes mellitus, psoriatic arthritis in multiple joints and obesity, but the impairments did
20 not meet or equal any “listed” impairment under 20 C.F.R.. Part 404, Subpart P, Appendix 1. (*Id.* at 21-
21 22). The ALJ concluded Hillen retained the residual functional capacity to perform the full range of
22 sedentary work, which would allow Hillen to perform past relevant work. (*Id.* at 23-25).

1 Though not explicitly stated, Hillen appears to limit his appeal to the ALJ's assessment of Hillen's
2 residual functional capacity. Hillen does not assert that he suffered from additional medically
3 determinable severe impairments or that his impairments equaled a "listed" impairment. Instead, Hillen
4 appeals the ALJ's decision on two grounds relating to Hillen's ability to work. First, Hillen argues the
5 ALJ failed to articulate specific and legitimate reasons for rejecting the treating physician's opinion. (*Id.*
6 at 5). Second, Hillen argues the ALJ failed to articulate clear and convincing reasons for rejecting Hillen's
7 testimony. (*Id.* at 11).

8 **I. Discounting the Treating Physician's Opinion**

9 In concluding that Hillen is capable of performing sedentary work, the ALJ gave little weight to
10 the opinion of Dr. Allen, the treating physician. (*Id.* at 25). Dr. Allen opined that Hillen can sit for one
11 hour within an eight-hour workday,¹ stand and/or walk less than two hours in an eight-hour workday, lift
12 and/or carry up to ten pounds occasionally, never climb or balance, and do only limited reaching and
13 handling. (*Id.* at 473-474).

14 Hillen asserts the ALJ's reasons for giving Dr. Allen's opinion little weight "does not reach the
15 level of specificity required." (ECF No. 15 at 6-8). Hillen further argues the ALJ inserted his personal
16 bias in rejecting Dr. Allen's course of treatment and failed to explain why the ALJ's interpretation, rather
17 than the treating physician's interpretation, was correct. (*Id.* at 8-10).

18 A treating physician's medical opinion as to the nature and severity of an individual's impairment
19 is entitled to controlling weight when that opinion is well-supported and not inconsistent with other
20 substantial evidence in the record. *See, e.g., Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir. 2001).

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24 ¹There is a potential inconsistency within Dr. Allen's opinion, as he also states Hillen "can sit 1 hour at a time" and he
25 "would require break[s] every 1 hour." (ECF No. 16 at 473-474). However, neither the ALJ nor the parties have addressed
this point.

1 If an ALJ opts to not give a treating physician's opinion controlling weight, the ALJ must apply the factors
2 set out in 20 C.F.R. § 404.1527(c)(2)(i)-(ii) and (c)(3)-(6) in determining how much weight to give the
3 opinion, including length of treatment relationship and frequency of examination. The opinion of a
4 treating physician is not necessarily conclusive as to the existence of an impairment or the ultimate issue
5 of a claimant's disability. *See, e.g., Thomas v. Barnhart*, 278 F.3d 947, 956 (9th Cir. 2002).

6 When evidence in the record contradicts the opinion of a treating physician, the ALJ must present
7 "specific and legitimate reasons" for discounting the treating physician's opinion, supported by substantial
8 evidence. *See Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009). The opinions
9 of non-treating or non-examining physicians may also serve as substantial evidence when the opinions are
10 consistent with independent clinical findings or other evidence in the record. *See Thomas*, 278 F.3d at
11 956-957. The ALJ need not accept the opinion of any physician, including a treating physician, if that
12 opinion is brief, conclusory, and inadequately supported by clinical findings. *Id.*

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14 In this case, the ALJ presented sufficient specific and legitimate reasons to discount Dr. Allen's
15 opinion. The ALJ stated that he:

16 gave little weight to Dr. Allen's opinion. The Course of treatment pursued by [] Dr. Allen
17 was not consistent with what one would expect if the claimant were truly disabled, as the
18 doctor has reported. Moreover, although Dr. Allen did have a treating relationship with
the claimant, the record revealed that actual treatment visits were relatively infrequent."

19 (ECF No. 16 at 25). This statement follows the proper procedure for evaluating a treating physician's
20 opinion, as the ALJ initially determined that Dr. Allen's opinion was inconsistent with substantial
21 evidence in the record and then applied a factor listed in 20 C.F.R. § 404.1527(c)(2), the frequency of
22 examination, in determining the weight to give to Dr. Allen's opinion.

23 The ALJ's determination that Dr. Allen's opinion is inconsistent with the record is supported by
24 substantial evidence. As the ALJ noted, Hillen's treatment for his medical conditions was "essentially
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1 routine and conservative in nature. He did not require emergency room or hospital treatment or extensive
2 evaluation or testing.” (ECF No. 16 at 23). Dr. Allen’s own notes focus on routine check-ups and refilling
3 prescriptions and fail to indicate that Hillen’s condition was so severe that he would, for example, be
4 unable to sit for more than one hour for an entire workday. In addition, the ALJ cited several other medical
5 opinions that reached different conclusions from Dr. Allen’s. (*Id.* at 24-25). This type of evidence has
6 been found to provide sufficient support for an ALJ’s determination by the 9th Circuit. *See Connett v.*
7 *Barnhart*, 340 F.3d 871, 874-75 (9th Cir. 2003) (lack of support in the physician’s own treatment notes);
8 *Thomas*, 278 F.3d at 956-957 (conflicting opinions of physicians). Therefore, the Court recommends
9 denying Hillen’s motion to reverse or remand and granting the Commissioner’s motion to affirm.

10 **II. Discounting Hillen’s Credibility**

11 In finding that Hillen is able to perform sedentary work, the ALJ discounted Hillen’s testimony
12 that he would be unable to handle work that would allow him to sit in one place and move around when
13 needed because he would “be laid out...the next day...if not two or three days or a week” due to back
14 pain. (ECF No. 16 at 42, 48). Hillen argues that in discounting his testimony, the ALJ failed to cite to
15 specific citations in the record, simply recited medical evidence without explaining its impact on the ALJ’s
16 determination, and failed to take into account Hillen’s good work history. (ECF No. 25 at 13-15).

18 If the ALJ decides to discount the claimant’s testimony regarding his or her subjective symptoms,
19 the ALJ must engage in a two-step analysis before finding the claimant’s testimony lacks credibility. SSR
20 96-7p; *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, the ALJ must determine
21 whether the claimant has presented objective medical evidence of an underlying impairment “which could
22 reasonably be expected to produce the pain or other symptoms alleged.” *Bunnell v. Sullivan*, 947 F.2d
23 341, 344 (9th Cir. 1991) (en banc) (internal quotation marks omitted). The claimant “need not show that
24 her impairment could reasonably be expected to cause the severity of the symptom she has alleged; she
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1 need only show that it could reasonably have caused some degree of the symptom.” *Smolen v. Chater*, 80
2 F.3d 1273, 1282 (9th Cir. 1996); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (“[T]he
3 Commissioner may not discredit the claimant’s testimony as to the severity of symptoms merely because
4 they are unsupported by objective medical evidence.”).

5 Second, if the claimant meets this first test, and there is no evidence of malingering, “the ALJ can
6 reject the claimant’s testimony about the severity of her symptoms by offering specific, clear and
7 convincing reasons for doing so.” *Smolen*, 80 F.3d at 1281; *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880,
8 883 (9th Cir. 2006) (“[U]nless an ALJ makes a finding of malingering based on affirmative evidence
9 thereof, he or she may only find an applicant not credible by making specific findings as to credibility and
10 stating clear and convincing reasons for each.”).²

11 To support a finding of less than fully credible, the ALJ is required to point to specific facts in the
12 record that demonstrate that the individual’s symptoms are less severe than he claims. *Vasquez*, 572 F.3d
13 at 592. General findings are not sufficient; the ALJ must identify what testimony is not credible and what
14 evidence undermines the claimant’s complaints. *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). In
15 weighing a claimant’s credibility, the ALJ may consider factors such as (1) objective medical evidence;
16 (2) reputation for truthfulness; (3) the type, dosage, effectiveness, and side effects of any medication the
17 individual takes or has taken to alleviate pain or other symptoms; (4) inconsistencies in testimony or
18 between testimony and conduct; (5) the claimant’s daily activities; (6) and the claimant’s treatment
19 history. SSR 96-7p; *see also Orn v. Astrue*, 495 F.3d 625, 636-639 (9th Cir. 2007); *Ghanim v. Colvin*,
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23 ² At the time of the ALJ’s decision, the credibility analysis was governed by SSR 96-7p. Effective March 28, 2016, SSR 16-
24 3p superseded SSR 96-7p. While Hillen asserts SSR 16-3p applies, his assertion is internally inconsistent, as he also states he
25 “does not contend that the new ruling defeated any reliance on the old ruling.” (ECR No. 25 at 12). The ALJ’s decision
regarding Hillen’s claim was issued on July 18, 2014. Thus, SSR 96-7p governed the ALJ’s decision and the Court will review
the ALJ’s decision under the guidance provided in SSR 96-7p.

1 763 F.3d 1154, 1163 (9th Cir. 2014). If the “ALJ’s credibility finding is supported by substantial evidence
2 in the record, [a court] may not engage in second-guessing.” *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th
3 Cir. 2002).

4 After reviewing the administrative record, the parties’ briefs, and applicable law, the Court finds
5 that the ALJ provided clear and convincing reasons for finding Hillen’s testimony not fully credible. The
6 ALJ first found that Hillen’s medically determinable impairments could reasonably be expected to cause
7 the alleged symptoms. (ECF No. 16 at 25). But, the ALJ found that Hillen’s statements concerning the
8 intensity, persistence, and limiting effects of these symptoms were not entirely credible. (*Id.*). The ALJ
9 found that Hillen’s conservative course of treatment, failure to mention allegedly disabling back pain to
10 medical providers on numerous occasions, and the objective medical evidence were inconsistent with
11 Hillen’s allegations. (*Id.* at 23-25).

12 All of those considerations have been found to be proper by the Ninth Circuit.³ In addition, all of
13 the ALJ’s findings are supported by substantial evidence. (ECF No. 16 at 23-25 (providing citations to
14 the record)). Assuming, *arguendo*, it was an error for the ALJ to omit any mention of work history in his
15 credibility determination, the error is harmless in light of the other factors weighing against Hillen’s
16 credibility. *Brown-Hunter*, 806 F.3d at 492 (a decision will be upheld if the error “is inconsequential to
17 the ultimate nondisability determination”) (quoting *Treichler*, 775 F.3d at 1099). Therefore, the Court
18 recommends denying Hillen’s motion to reverse or remand and granting the Commissioner’s motion to
19 affirm.
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23 ³ See e.g., *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) (“Although a lack of medical evidence cannot form the sole
24 basis for discounting pain testimony, it is a factor that the ALJ can consider in his credibility analysis”); see also *Parra v.*
25 *Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007) (an ALJ may permissibly consider the claimant’s conservative treatment in making
an adverse credibility determination); *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995) (same for inconsistent
statements).


1 ACCORDINGLY,

2 IT IS RECOMMENDED that Plaintiff Chadd Hillen's Motion for Reversal and/or Remand (ECF
3 No. 25) be DENIED.

4 IT IS FURTHER RECOMMENDED that the Commissioner's Cross-Motion to Affirm. (ECF No.
5 27) be GRANTED.

6 IT IS SO RECOMMENDED.

7 DATED this 12th day of September, 2017.

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11 CAM FERENBACH
12 UNITED STATES MAGISTRATE JUDGE
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